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Ralph Reid and Milt Stamoulis v. Oluf H. Andersen, Ellen M. Andersen; and S. M. Kalm dba Kalm & Son Real Estate Company, and Sterling G. Webber : Brief of Appellants

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RALPH REID and MILT STAM-
OULIS,

Plaintiffs and Appellants,

— vs. —

OLUF H. ANDERSEN, ELLEN M.
ANDERSEN, his wife; and S. M.
KALM, d.b.a. KALM & SON
REAL ESTATE COMPANY, and
STERLING G. WEBBER,

Defendants and Respondents.

CASE

NO. 7183

FILE

BRIEF OF APPELLANTS

JUN 11 1948

CLERK, SUPREME COURT,

WALTER H. ANDERSON

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In the Supreme Court of the State of Utah

RALPH REID and MILT STAM-
OULIS,

Plaintiffs and Appellants,

— vs. —

OLUF H. ANDERSEN, ELLEN M.
ANDERSEN, his wife; and S. M.
KALM, d.b.a. KALM & SON
REAL ESTATE COMPANY, and
STERLING G. WEBBER,

Defendants and Respondents.

CASE
NO. 7183

BRIEF OF APPELLANTS

STATEMENT OF FACTS

The appellants who were the plaintiffs in the lower court filed a petition for declaratory judgment seeking to have the legal rights, duties, liabilities and responsibilities of the parties made definite and certain as these respective relations were affected by transactions pertaining to the purported sale of certain real estate. (Tr. 1-5.)

The records of Salt Lake County Recorder's Office show that the defendant Oluf H. Andersen acquired the

property in question in his own name. This defendant and his wife, Mrs. Ellen M. Andersen executed a written agency agreement by which they listed the property for sale with the defendant, S. M. Kalm d.b.a. Kalm & Son Real Estate Company, for the sum of \$10,000. Plaintiffs attempted to purchase this property through said real estate agent for \$9,000, but the owners still wanted \$10,000. The defendants S. M. Kalm and his employee, Sterling G. Webber, obtained and received a \$500 down payment from the plaintiffs and signed the Ernest Money Receipt and Agreement as "agents." Defendant Oluf H. Andersen signed the Ernest Money Receipt stating, "I will accept \$10,000 cash." Plaintiffs accepted by an "O.K." and plaintiff Reid's signature.

At the time Mr. Andersen signed the Ernest Money Receipt, his wife, Mrs. Ellen M. Andersen verbally agreed to all the terms and conditions of the sale and told her husband, in the presence of all of the defendants, that she approved of the terms and that the entire transaction was agreeable to her. She did not sign the Ernest Money Receipt, however, for the sole reason that her signature was not requested at that time by any of the defendants.

The Abstract of Title had been approved, and the parties all contemplated the execution of a proper conveyance of title upon payment of the balance of \$9,500 by the plaintiffs. The defendants Kalm and Webber notified plaintiffs that the deal was closed, where upon plaintiffs tendered the balance of \$9,500. The defendants Mr. and Mrs. Andersen, according to plaintiffs' infor-

mation and belief, had meanwhile received a better offer for the property and consequently refused to accept the balance tendered, and each refused to execute any conveyance whatsoever upon the excuse that they were not required to do so because Mrs. Andersen had not personally signed the Ernest Money Receipt and Agreement.

Plaintiffs asked for declaratory relief and declaration of rights, asking the court to judicially determine whether or not plaintiffs were entitled to specific performance by each or either of the defendants Andersen under any theory arising out of the facts and more particularly under the theory of agency, estoppel, part performance or abatement of purchase price to protect purchaser against possible assertion of Mrs. Andersen's inchoate right of dower.

Petitioners further asked the court to settle the uncertainty of their rights against the defendant real estate agent as pertaining to his actual agency, possible liability and damages for exceeding the scope of his authority and the ultimate disposition of the \$500 paid by plaintiffs and still held by said defendant real estate agent.

Defendants Oluf H. Andersen and Ellen M. Andersen, his wife, each separately demurred, both generally and specially, to the petition and amended petition, (Tr. 12-15, 44-46, 50-52) upon the grounds of uncertainty as to whether or not the plaintiffs were suing upon an oral or written contract, improperly uniting causes of action,

misjoinder of parties defendant, and not stating sufficient facts to constitute a cause of action. The lower court sustained the demurrers and dismissed with prejudice as to defendant Ellen M. Andersen (Tr. 20). This first dismissal was set aside (Tr. 32) and plaintiffs given an opportunity to amend. Demurrers were again interposed and again the action dismissed with prejudice as to defendant Ellen M. Andersen (Tr. 56-57). Plaintiffs declined to further amend, and the entire action was dismissed as to each and all defendants. This appeal is brought on the judgment roll from the lower court.

The undisputed facts, all of which are admitted to be true, for the purpose of considering the demurrers and also for the purpose of this appeal, are set forth in quite some detail in the petition (Tr. 1-5) and the amended petition (Tr. 32-38). Authorities for this fundamental rule of law are submitted in the argument.

STATEMENT OF ERRORS

1. It was error for the lower court to dismiss in each instance, the action with prejudice as against defendant Mrs. Ellen M. Andersen (Tr. 56, 20).

2. It was error to sustain one defendant's general demurrer as to another defendant (Tr. 50-52, para. 6 and Tr. 55).

3. The court erred in sustaining Defendants' motions to strike as to paragraph 3 of said motions (Tr. 55, 42, 48).

4. The court erred in sustaining each of the demurrers and in each particular thereof.

5. The court erred in each instance in dismissing the action for declaratory relief and thereby refusing to take jurisdiction of the case under plaintiffs' pleadings.

ARGUMENTS

It is rather apparent from the judgment roll that the lower court had a gross misunderstanding of the general intent and purpose of our declaratory judgment statute. There is an obvious failure to distinguish between the fundamental rules for stating a cause of action for declaratory relief and the ordinary cause of action in suits of law and equity. Plaintiffs contend that their petition and amended petition for declaratory relief each set forth sufficient facts arising out of a justiciable controversy to justify declaration of his rights and to have made certain, as between the parties, those uncertain legal relations which arose out of the contract.

The basic law supporting appellants position is well stated in:

Maguire v. Hibernia Savings and Loan Soc., 23 Cal. 2d 719, 146 P. 2d 673 and 151 A.L.R. 1062:

“A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these

rights and duties be adjudged by the court. Code Civ. Proc., sec. 1060; Moss v. Moss, 20 Cal. 2d 640, 128 P. 2d 526, 141 A.L.R. 1422; City of Alturas v. Gloster, 16 Cal. 2d 46, 104 P. 2d 810; Pacific States Corp. v. Pan-American Bank, 213 Cal. 58, 1 P. 2d 4, 981; Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 277 P. 487; Andrews v. W. K. Company, 35 Cal. App. 2d 41, 94 P. 2d 605; Oldham v. Moodie, 94 Cal. App. 88, 270 P. 688. Both the first and second counts of the complaint herein allege that the existence in plaintiffs or their predecessor of the rights asserted by them is denied by defendants and that defendants intend to convert the reserve fund into capital stock and distribute the same in disregard of plaintiffs' claimed rights; both counts set forth the written instruments upon which plaintiffs base their controverted claims and pray for a judicial construction thereof. The complaint, therefore, shows that there is an actual controversy relating to the legal rights and duties of the respective parties."

The case at bar has certainly shown that there is an actual controversy relating to the legal rights and duties pertaining to the respective parties and had appellants little more than prayed for judicial construction of the Ernest Money Receipt and Agreement, it appears a sufficient cause of action for declaratory judgment would have been stated. The above cited case and the numerous cases cited therein support appellants' contention. The court in the last cited case at page 678 states the rule in the following language:

"The rule is stated in Anderson, Declaratory Judgments, page 275, as follows: 'A declaratory

complaint will not be dismissed because the court disagrees with the construction of the contract involved, contended for by plaintiff. A complaint in an action for declaratory relief which recites in detail the dispute between the parties and prays for a declaration of rights and other legal relations of the parties, states facts sufficient to constitute a cause of action against a motion to dismiss for insufficiency of the complaint.' ”

Appellants maintain that, imperfect as the petition and amended petition may be from the standard of a model complaint, nevertheless the lower court erred in sustaining the demurrers and dismissing the complaint and thereby failing to recognize the intent and purpose of the declaratory judgment statute.

The Wyoming Supreme Court, in the following case, adopts the general rule in the following language:

Anderson et al. v. Wyoming Development Co. et al. (154 P. 2d 318 at page 334):

“ . . . generally speaking, an action for declaratory relief should not be disposed of on demurrer: *Neubeck v. McDonald*, 128 Misc. 768, 220 N.Y.S. 761, 762; *Miller v. Currie*, 208 Wis. 676, 242 N. W. 570, 572; *Oldham v. Moodie*, 94 Cal. App. 88, 270 P. 688; *City of Cherryvale v. Wilson*, 153 Kan. 505, 112 P. 2d 111, 115, and *Bruckman v. Bruckman Co.*, 60 Ohio App. 361, 21 N. E. 2d 481. See also *Cabell v. City of Cottage Grove*, 170 Or. 256, 130 P. 2d 1013, 144 A.L.R. 286; *Maguire v. Hibernia Savings & Loan Soc.* 23 Cal. 2d 719, 146 P. 2d 673, 151 A.L.R. 1062, and authorities cited. The position of these courts may very well be illustrated by what the Supreme

Court of Kansas has said in the case of *City of Cherryvale v. Wilson*, supra (153 Kan. 505, 112 P. 2d 111, at 115), as follows:

“Assuming there is an actual controversy between the parties, the petition should state the facts out of which the controversy arose, should state clearly the view or claim of plaintiff and also state clearly the view or claim of the defendant, and the court should be asked to adjudicate the controversy. The appropriate pleading for defendant to file is an admission that the controversy arose from the facts stated by plaintiff, and that plaintiff’s contention is correctly stated; also, that defendant’s contention is correctly stated, if, of course, defendant agrees that the matters are so pleaded. If defendant thinks the facts giving rise to the controversy are not accurate or fully stated, or that the contention of the plaintiff, or that the contention of the defendant, is not accurately or fully stated, his answer should plead the facts and the contention as he understands them to be. If defendant pleads the facts and the contention is contrary to that pleaded by plaintiff, plaintiff by reply should either admit those, or deny them.”

The Wisconsin Supreme Court summarized the rule in the following case with the following language:

State ex rel. La Follette v. Dammann, 220 Wis. 17, 264 N.W. 627, quoting from page 629:

“The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a

controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination. Declaratory Judgments, Borchard, pp. 26-57."

ENTITLED TO DECLARATION IF NOT RELIEF

The distinction the appellant has tried to make and which the lower court has failed to recognize is well stated in the following case:

Bruckman v. Bruckman Co. 60 Ohio App. 361, 21 N.E. 2d 481:

"Where the petition for a declaratory judgment alleged facts sufficient to state cause of action, demurrer should not have been sustained even though plaintiff was entitled to no relief, since effect of that action was to hold that he had not alleged sufficient facts to constitute cause of action."

"Where petition in proceeding for declaratory judgment alleged facts sufficient to state a cause of action, a court must state the rights, if any, to which the plaintiff is entitled." Also see *Anderson on Declaratory Judgment*, Section 101, page 271.

Anderson on Declaratory Judgment, Section 101, Pocket Part and also cited in the foot note, *City of Cherryvale v. Wilson* 112 P. 2d 111, 153 Kan. 505, recognizes the law in this language:

“It ought to be noted that a demurrer is rarely appropriate in a declaratory judgment action.”

The lower court erred in dismissing the action with prejudice as against the defendant Ellen M. Andersen because even though the court may have believed plaintiffs had no legal rights against said defendant by reason of the statute of frauds or otherwise, the plaintiffs had set forth sufficient facts to justify a judicial determination and a declaration of rights arising out of this uncertainty. Although the lower court may have disagreed with the plaintiffs' claim for relief on the theory of agency, part performance or estoppel from asserting statute of fraud, the plaintiffs were still entitled to declaration of their rights.

Rockland Power & Light Co. v. City of New York, 289 N.Y. 45, 43 N.E. 2d 803, the court held:

“A complaint praying for judgment declaring the rights and legal relations of parties should not be dismissed as insufficient merely because the facts alleged show that plaintiff is not entitled to a declaration of rights as plaintiff claims them to be, but court should, in proper case, retain jurisdiction of action and exercise its power to declare rights and legal relations of parties whatever they may be.” (Quoting from Syllabus, paragraph 5.)

Also in the following case, the court stated:

Alabama State Milk Control Board et. al. v. Graham, 33 So. 2d 11:

“The test of the sufficiency of a complaint in declaratory judgment proceeding is, not whether complaint shows that plaintiff will succeed in getting a declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all.” (Quoting from Syllabus, paragraph 7.)

“Plaintiff, who states the substance of a bona fide justiciable controversy which should be settled, states a cause of action for declaratory judgment.” (Quoting from Syllabus, paragraph 8).

The following case arising out of an oral contract for employment closely parallels the issues in the case at bar and has been extensively annotated in A.L.R. The California Court states the law in the following language:

Columbia Pictures Corporation v. De Toth, 26 Cal. 2d 753, 161 P. 2d 217; 162 A.L.R. 747:

“To entitle a plaintiff to seek declaratory relief, it is not essential that he should establish his right to a favorable declaration.” (Quoting Syllabus, paragraph 8.)

“The purpose of declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.” (Quoting Syllabus, paragraph 9.)

“The court is empowered to determine disputed questions of fact, and hence remedy by declaratory relief is not limited to cases involving a written instrument, and disputed oral contract may properly be the subject of a declara-

tory judgment.” (Quoting Syllabus, paragraph 10.)

The Utah Supreme Court recognized the law in the following case and with the following language:

Whitmore v. Murray City, 107 Utah 405, 154 P. 2d 748:

“A declaratory judgment is proper remedy whenever it will serve useful purpose in settling uncertainty and insecurity giving rise to proceeding therefor.” (Quoting from Syllabus, paragraph 9, which also cites the case of Gray v. Defa, 103 Utah 339, 135 P. 2d 251.

DEMURRER ADMITS THE ALLEGATIONS

Although it is fundamentally accepted as a basic proposition of law that demurrers, for the purpose of argument, admit the truthfulness of the allegations in the complaint, the lower court seemed to ignore this principle.

Moss v. Moss, 20 Cal. 2d 640, 128 P. 2d 526; 141 ALR 1422:

“On appeal from judgment sustaining demurrer to complaint without leave to amend, allegations of complaint must be regarded as true.” (Quoting from Syllabus, paragraph 1.)

“A demurrer admits allegations of complaint.” (Quoting from Syllabus, paragraph 3.)

JOINDER OF PARTIES

The defendants, Andersen and Andersen repeatedly contended there was a misjoinder of parties defendant,

yet they admit allegations of the petition and amended petition for declaratory relief.

The plaintiffs have only complied with the declaratory judgment statute by joining the parties "who have or claim any interest which would be affected by the declaration" (quoted from the statute), and although the court may declare that plaintiffs are entitled to no relief in the form of specific performance or damages as against the defendant Ellen M. Andersen, still she is a necessary party for a complete adjudication of the controversy.

The uniform declaratory judgment act is set forth in our statute as: Utah Code Annotated 1943, Sections 104-64-1 to 104-64-13.

The section dealing with parties reads as follows:
104-64-11. Parties.

"When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . ."

The intent of the legislature as pertains to the interpretation of this act can hardly be made any plainer than is set forth as follows:

104-64-12. Chapter to Be Liberally Construed.

"This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights,

status and other legal relations; and is to be liberally construed and administered.”

If the defendants Kalm and Webber had been omitted from this action and if the lower court entered its declaratory judgment, finding that said defendant real estate agents had exceeded their authority and were liable in damages, or were at least liable for refund of the \$500 down-payment, it becomes obvious why they are necessary parties in order to have a complete adjudication of plaintiffs' rights.

Anderson on Declaratory Judgments, Section 37, page 115, states the generally accepted rule as follows:

“A plaintiff, seeking a determination of any cause by means of a judgment declaring rights, liabilities, and jural relations, must comply with the provisions of the declaratory judgment statute by naming all of the persons as parties who have a right to defend the action, or who are interested therein, or who will be affected by the making of a declaration of rights.

The traditional ruling that is customarily encountered and applied in coercive actions is hardly applicable to the elastic remedy offered by the uniform declaratory judgment statute and indeed the rule applicable to this class of action is far different to the ruling obtained in the ordinary actions of law and suits of equity and,

“While no complaint can be made against failure to join a party no longer interested, yet, if a defendant had a contingent interest in the

action or proceeding, that is sufficient to warrant joining him.”

The above quote is from Anderson on Declaratory Judgments, Section 36, page 113, and citing in the foot notes thereof the cases of Wollenberg v. Tonningsen, 48 P. 2d 738, 8 Cal. App. 2d 722; Utica Mutual Insurance Company v. Hamera 292 N.Y.S. 811, 162 Misc. 169.

Regarding the defendant Oluf H. Andersen's general demurrer (Tr. 50-52, paragraph 6) in which he states amended petition does not set forth sufficient facts to constitute a cause of action against the defendant Ellen M. Andersen, the following seems to be the accepted law:

49 C. J. 366, Section 461:

“Where several defendants are joined and no cause of action is alleged against one of them, he may demur separately, but a joint demurrer can not be sustained. One defendant can not, except on demurrer on the ground that the complaint or petition shows no cause of action against another defendant.”

The lower court in its zeal to dismiss plaintiffs action for declaratory relief even ignored the legal principle set forth in the last sentence of the above quotation. (Tr. 55, 50-52 paragraph 6).

It is respectfully submitted that the judgments of dismissal of the lower court should be reversed and the cause remanded for trial and the lower court be further

directed to make and enter its declaratory judgment accordingly.

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